

I hereby certify that this correspondence is being deposited with the United States Postal Service as Express Mail No. EV717285059US with sufficient postage in an envelope addressed to Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on March 24, 2006.
Reinhart Boerner Van Deuren s.c.

PATENT APPLICATION

By: Leslie S. Miller
Leslie S. Miller

Date: March 24, 2006

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

GROUP ART UNIT: 3727

EXAMINER: JES F. PASCUA

In re application of: Aaron Strand,)
Karl L. Linck, Judy Fischer,)
Thomas Spaeth, and Jerry D. Kolbe)
Application No: 09/774,275)
Filed: January 30, 2001)
Attorney Docket No. 8362-CIP-)
DIV)

For: A RESEALABLE BAG FOR
FILLING WITH FOOD
PRODUCT(S) AND METHOD

Commissioner for Patents
MAIL STOP APPEAL BRIEF - PATENTS
P.O. Box 1450
Alexandria, VA 22313-1450

March 24, 2006

APPEAL BRIEF

Sir:

Appellants, pursuant to 37 C.F.R. § 41.37, hereby file this Appeal Brief as part of
the appeal on the above-referenced patent application.

03/27/2006 MBIZUNES 00000025 09774275

02 FC:1402

500.00 DP

I. Real Party in Interest

The real party in interest in this application is Sargento Foods, Inc., the recorded assignee of the entire title of the subject application.

II. Related Appeals and Interferences

There are no other related appeals or interferences.

III. Status of Claims

Claims 75-116 and 138-153 are pending in the case, with Claims 79, 80, 99, 100, and 144 being withdrawn from consideration, and the rest of the claims being finally rejected. (In the April 22, 2005, Office Action, Claim 116 was inadvertently withdrawn from consideration by the Examiner. In a telephone conference with the Examiner on March 23, 2006, Appellants' undersigned attorney and the Examiner agreed that Claim 116 should not have been withdrawn from consideration, and should instead have been rejected together with Claims 75-77, 81-85, 89, 90, 96, 97, 101-105, 109, 110, 138-141, 143, 145, 147, and 152 in Section 5 of the April 22, 2005, Office Action, and agreed to so treat Claim 116.) Claims 75-116 and 138-153 are the subject of this appeal, and a copy of these claims is attached hereto as the Claims Appendix.

IV. Status of Amendments

A March 5, 2005, amendment to the claims was the last amendment to be made to the claims, and was entered and considered. There was no post-final rejection

amendment, leaving Claims 75-116 and 138-153 pending, with Claims 79, 80, 99, 100, and 144 being withdrawn.

V. Summary of Claimed Subject Matter

Four independent claims (together with claims dependent thereupon) directed toward a reclosable bag for filling with at least one food product are involved in this appeal: Claims 75, 96, 116, and 138. Appellants regard as their invention a reclosable bag formed of web material having a fold therein which forms the top of the bag (as best described in the accompanying portions of the specification in paragraphs 121-124 as amended, and as best shown in Figs. 40, 40a, 40b, 40c, 40d, 40e, 41, and 41a as amended, with both this portion of the specification and annotated versions of these figures being included in the Evidence Appendix). Two areas of structural weakness are located on opposite sides of the fold, and an opening which may be used to fill the bag is located in the bag in a position which is directly opposite the fold. A reclosable fastener has a skirt structure including a distal portion which is coupled to the web material, and the reclosable fastener and its skirts extend over the two areas of structural weakness and the fold at the top of the bag to protect their integrity. The distal portions of the skirts are coupled to the bag in corresponding positions on opposite sides of the bag at locations between the areas of structural weakness and the opening. The portion of the web material forming the fold and between the two areas of structural weakness may be removed to unseal the contents of the bag, and the reclosable fastener allows access to the

contents of the bag and enables the bag to be resealed. Thus, the tear-off portion represents a tamper-evident safeguard.

A concise explanation of the subject matter defined in each of these four independent claims will be described below, together with references to the specification of the application as filed by page and line numbers, and to the drawings by reference numerals.

Claim 75. Claim 75 is directed to "[a] reclosable bag for filling with at least one food product." The reclosable bag of Claim 75 is primarily shown as element 100 of Figs. 40, 40a, 40b, 40c, 40d, 40e, 41, and 41a and is described in the specification primarily in paragraphs 121-124. Claim 75 has five paragraphs, each of which will be briefly discussed and references to the specification and drawings will be identified.

Claim 75, Paragraph 1 (lines 3-5). The sheet of web material is the parent film 10, shown in Figs. 40, 40a, 40b, 40c, 40d, 40e, 41, and 41a and described in the specification in paragraphs 121-123. The at least one fold is the fold structure 11, shown in Figs. 40, 40a, 40b, 40c, 40d, 40e, 41, and 41a and described in the specification in paragraphs 121-123. The two areas of structural weakness are the weakened area 12 shown in Figs. 40, 40a, 41, and 41a and described in the specification in paragraph 121; the tear line 132 shown in Figs. 40 and 40a and described in the specification in paragraph 122; and the perforations 12b shown in Fig. 40b, the microperforations 12c shown in Fig. 40c, the scores 12d shown in Fig. 40d, and the area 12e of material or

materials which are specifically designed to be easily torn shown in Fig. 40e, which are described in the specification in paragraph 121. The opening directly opposite the fold is the fill opening 33, shown in Fig. 41 and described in the specification in paragraphs 83, 94, and 115.

Claim 75, Paragraph 2 (lines 6-8). The reclosable fastener structure is the zipper assembly 20, shown in Figs. 40, 40a, 40b, 40c, 40d, 40e, 41, and 41a and described in the specification in paragraphs 121-123. The zipper assembly 20 is shown in considerably greater detail in Figs. 3, 4, 24, and 25, and is further described in the specification in paragraphs 78 and 81. The two releasably engageable tracks are shown in some detail in Figs. 3, 4, 24, and 25, and are described in the specification in paragraph 78. The skirt structures of skirt web material are the zipper skirts 16, shown in Figs. 41 and 41a and described in the specification in paragraphs 121-123. The zipper skirts 16 are shown in considerably greater detail in Figs. 3, 4, 24, and 25, and are further described in the specification in paragraphs 78 and 81. The fold structure 11 is shown as being located in the zipper assembly 20 structure intermediate the zipper skirts 16 in Figs. 41 and 41a, as described in paragraphs 121-123, and also in paragraphs 27 and 28.

Claim 75, Paragraph 3 (line 9). The skirt structures each including a distal margin are the zipper skirts 16 are shown in Figs. 41 and 41a and in Figs. 3, 4, 24, and 25, and are described in the specification paragraphs 121-123 as well as in paragraphs 27 and 28.

Claim 75, Paragraph 4 (lines 10-12). The distal margins of the skirt structures are coupled to the web material at corresponding opposed locations respectively located between the areas of structural weakness and the opening are the distal margins of the zipper skirts 16 at locations between the weakened areas 12 and the fill opening 33 as shown in Figs. 41 and 41a and as described in the specification paragraphs 121-123.

Claim 75, Paragraph 5 (lines 13-4). The reclosable fastener structure extends past the fold and the areas of structural weakness is the zipper assembly 20 which extends past the fold structure 11 and the weakened areas 12 as shown in Figs. 41 and 41a and as described in the specification paragraphs 121-123.

Claim 75, Paragraph 6 (lines 15-16). The reclosable bag capable of being filled with at least one food product through said opening is the bag 100 which may be filled through the fill opening as shown in Fig. 41 and as described in the specification in paragraphs 83, 94, and 115.

Claim 96. Claim 96 is directed to "[a] reclosable bag for filling with at least one food product." The reclosable bag of Claim 96 is primarily shown as element 100 of Figs. 40, 40a, 40b, 40c, 40d, 40e, 41, and 41a and is described in the specification primarily in paragraphs 121-123. Claim 96 has three paragraphs, each of which will be briefly discussed and references to the specification and drawings will be identified.

Claim 96, Paragraph 1 (lines 3-5). The sheet of web material is the parent film 10, shown in Figs. 40, 40a, 40b, 40c, 40d, 40e, 41, and 41a and described in the specification in paragraphs 121-123. The at least one fold is the fold structure 11, shown in Figs. 40, 40a, 40b, 40c, 40d, 40e, 41, and 41a and described in the specification in paragraphs 121-123. The two areas of structural weakness are the weakened area 12 shown in Figs. 40, 40a, 41, and 41a and described in the specification in paragraph 121; the tear line 132 shown in Figs. 40 and 40a and described in the specification in paragraph 122; and the perforations 12b shown in Fig. 40b, the microperforations 12c shown in Fig. 40c, the scores 12d shown in Fig. 40d, and the area 12e of material or materials which are specifically designed to be easily torn shown in Fig. 40e, which are described in the specification in paragraph 121. The opening is the fill opening 33 shown in Fig. 41 and described in the specification in paragraphs 83, 94, and 115.

Claim 96, Paragraph 2 (lines 6-12). The reclosable fastener structure is the zipper assembly 20, shown in Figs. 40, 40a, 40b, 40c, 40d, 40e, 41, and 41a and described in the specification in paragraphs 121-123. The zipper assembly 20 is shown in considerably greater detail in Figs. 3, 4, 24, and 25, and is further described in the specification in paragraphs 78 and 81. The two releasably engageable tracks are shown in some detail in Figs. 3, 4, 24, and 25, and are described in the specification in paragraph 78. The skirt structures of skirt web material are the zipper skirts 16, shown in Figs. 41 and 41a and described in the specification in paragraphs 121-123. The zipper skirts 16

are shown in considerably greater detail in Figs. 3, 4, 24, and 25, and are further described in the specification in paragraphs 78 and 81.

The skirt structures each including a distal margin are the zipper skirts 16 are shown in Figs. 41 and 41a and in Figs. 3, 4, 24, and 25, and are described in the specification paragraphs 121-123 as well as in paragraphs 27 and 28. The distal margins of said skirt structures are coupled to said web material at corresponding opposed locations respectively located between the areas of structural weakness and the opening are the distal margins of the zipper skirts 16 at locations between the weakened areas 12 and the fill opening 33 as shown in Figs. 41 and 41a and as described in the specification paragraphs 121-123. The reclosable fastener structure extends past the fold and the areas of structural weakness is the zipper assembly 20 which extends past the fold structure 11 and the weakened areas 12 as shown in Figs. 41 and 41a and as described in the specification paragraphs 121-123.

Claim 96, Paragraph 3 (lines 13-14). The reclosable bag capable of being filled with at least one food product through said opening is the bag 100 which may be filled through the fill opening as shown in Fig. 41 and as described in the specification in paragraphs 83, 94, and 115.

Claim 116. Claim 116 is directed to "[a] reclosable bag for filling with at least one food product." The reclosable bag of Claim 116 is primarily shown as element 100 of Figs. 40, 40a, 40b, 40c, 40d, 40e, 41, and 41a and is described in the specification

primarily in paragraphs 121-123. Claim 116 has five paragraphs, each of which will be briefly discussed and references to the specification and drawings will be identified.

Claim 116, Paragraph 1 (lines 3-7). The sheet of web material having first and second sides is the parent film 10 having a first side including the inside surfaces 35a and 36a and a second side including the outside surfaces 35b and 36b, best shown in Figs. 41 and 41a and described in the specification in paragraphs 121-123. The fold structure is the fold structure 11, shown in Figs. 40, 40a, 40b, 40c, 40d, 40e, 41, and 41a and described in the specification in paragraphs 121-123. The opening opposite the fold structure is the fill opening 33, shown in Fig. 41 and described in the specification in paragraphs 83, 94, and 115. The first side of the sheet of web material defining an interior of the reclosable bag is the inside surfaces 35a and 36a of the parent film 10 best shown in Figs. 41 and 41a and described in the specification in paragraphs 121-123. The second side of the sheet of web material defining an exterior of the reclosable bag is the outside surfaces 35b and 36b of the parent film 10 best shown in Figs. 41 and 41a and described in the specification in paragraphs 121-123.

Claim 116, Paragraph 2 (lines 8 and 9). The tear tape structure located in the web material on each side of the fold is the weakened area 12 shown in Figs. 40, 40a, 41, and 41a and described in the specification in paragraph 121, and the tear line 132 shown in Figs. 40 and 40a and described in the specification in paragraph 122.

Claim 116, Paragraph 3 (lines 10-15). The reclosable fastener structure is the zipper assembly 20, shown in Figs. 40, 40a, 40b, 40c, 40d, 40e, 41, and 41a and described in the specification in paragraphs 121-123. The zipper assembly 20 is shown in considerably greater detail in Figs. 3, 4, 24, and 25, and is further described in the specification in paragraphs 78 and 81. The two releasably engageable tracks are shown in some detail in Figs. 3, 4, 24, and 25, and are described in the specification in paragraph 78. The skirt structures of skirt web material are the zipper skirts 16, shown in Figs. 41 and 41a and described in the specification in paragraphs 121-123. The zipper skirts 16 are shown in considerably greater detail in Figs. 3, 4, 24, and 25, and are further described in the specification in paragraphs 78 and 81. The distal margins of said skirt structures are coupled to said web material at corresponding opposed locations respectively located between the areas of structural weakness and the opening are the distal margins of the zipper skirts 16 at locations between the weakened areas 12 and the fill opening 33 as shown in Figs. 41 and 41a and as described in the specification paragraphs 121-123.

Claim 116, Paragraph 4 (lines 16 and 17). T The reclosable fastener structure extends past the fold and the areas of structural weakness is the zipper assembly 20 which extends past the fold structure 11 and the weakened areas 12 as shown in Figs. 41 and 41a and as described in the specification paragraphs 121-123.

Claim 116, Paragraph 5 (line 18). The reclosable bag capable of being filled with at least one food product is the bag 100 shown in Figs. 40, 40a, 40b, 40c, 40d, 40e, 41, and 41a which may be filled described in the specification in paragraphs 83, 94, and 115.

Claim 138. Claim 138 is directed to "[a] reclosable bag for filling with at least one food product." The reclosable bag of Claim 138 is primarily shown as element 100 of Figs. 40, 40a, 40b, 40c, 40d, 40e, 41, and 41a and is described in the specification primarily in paragraphs 121-124. Claim 138 has four paragraphs, each of which will be briefly discussed and references to the specification and drawings will be identified.

Claim 138, Paragraph 1 (lines 3-7). The sheet of web material is the parent film 10, shown in Figs. 40, 40a, 40b, 40c, 40d, 40e, 41, and 41a and described in the specification in paragraphs 121-123. The front panel having a top, a bottom, and sides is the front side 35 of the parent film 10, shown in Figs. 41 and 41a and described in the specification in paragraph 122. The back panel having a top, a bottom, and sides is the back side 36 of the parent film 10, shown in Figs. 41 and 41a and described in the specification in paragraph 122. The back panel and the front panel coupled together are the front side 35 of the parent film 10 and the back side 36 of the parent film 10, connected together at the fold structure 11 as shown in Figs. 41 and 41a and described in the specification in paragraphs 121 and 122. The opening between the bottoms of the

front and back panels is the fill opening 33, shown in Fig. 41 and described in the specification in paragraphs 83, 94, and 115.

Claim 138, Paragraph 2 (lines 8-10). The area of structural weakness in each of the front and rear panels is the weakened area 12 shown in Figs. 40, 40a, 41, and 41a and described in the specification in paragraph 121; the tear line 132 shown in Figs. 40 and 40a and described in the specification in paragraph 122; and the perforations 12b shown in Fig. 40b, the microperforations 12c shown in Fig. 40c, the scores 12d shown in Fig. 40d, and the area 12e of material or materials which are specifically designed to be easily torn shown in Fig. 40e, which are described in the specification in paragraph 121.

Claim 138, Paragraph 3 (lines 11-17). The reclosable fastener structure is the zipper assembly 20, shown in Figs. 40, 40a, 40b, 40c, 40d, 40e, 41, and 41a and described in the specification in paragraphs 121-123. The zipper assembly 20 is shown in considerably greater detail in Figs. 3, 4, 24, and 25, and is further described in the specification in paragraphs 78 and 81. The first and second interlockable fastener tracks are shown in some detail in Figs. 3, 4, 24, and 25, and are described in the specification in paragraph 78. The skirt structures of skirt web material are the zipper skirts 16, shown in Figs. 41 and 41a and described in the specification in paragraphs 121-123. The zipper skirts 16 are shown in considerably greater detail in Figs. 3, 4, 24, and 25, and are further described in the specification in paragraphs 78 and 81. The distal portions of the skirt structures are the zipper skirts 16 are shown in Figs. 41 and 41a and in Figs. 3, 4, 24, and

25, and are described in the specification paragraphs 121-123 as well as in paragraphs 27 and 28.

The distal portion of the skirt structure of the first fastener track coupled to the front panel below the area of structural weakness in the front panel is the distal margin of the zipper skirt 16 attached to the front side 35 of the parent film 10 below the weakened area 12 as shown in Figs. 41 and 41a and as described in the specification paragraphs 121-123. The distal portion of the skirt structure of the second fastener track coupled to the rear panel below the area of structural weakness in the rear panel is the distal margin of the zipper skirt 16 attached to the rear side 36 of the parent film 10 below the weakened area 12 as shown in Figs. 41 and 41a and as described in the specification paragraphs 121-123.

Claim 138, Paragraph 4 (lines 18-21). The reclosable fastener assembly extends past the portion of the front and rear panels between the areas of structural weakness and the tops of the front and rear panels is the zipper assembly 20 which extends past the weakened areas 12 in the front side 35 and the rear side 36 and the fold structure 11 as shown in Figs. 41 and 41a and as described in the specification paragraphs 121-123.

VI. Grounds of Rejection to be Reviewed on Appeal

Claims 75-77, 81-85, 89, 90, 96, 97, 101-105, 109, 110, 116, 138-141, 143, 145, 147, and 152 (including **independent Claims 75, 96, 116, and 138**) stand rejected under

35 U.S.C. Section 103(a) as being unpatentable over Lingenfelter (U.S. Patent No. 3,181,583) and Plourde (U.S. Patent No. 5,875,611).

Other grounds of rejection are not being specifically appealed because they relate only to dependent claims which will be patentable if the independent claims upon which they depend are found to be patentable. For the purposes of discussion herein, each independent claim (Claims 75, 96, 116, and 138) will be argued separately, inasmuch as the invention of each such independent claim is separately and patentably distinguishable over the cited prior art.

VII. Argument

A. Summary of Arguments Presented on Appeal.

1. The 35 U.S.C. § 103 Rejection Fails to Present a Prima Facie

Case of Obviousness. The April 22, 2005, Office Action does not provide a proper reason to make the combination of references made. It is well established that in order to establish a prima facie case of obviousness the Examiner must present evidence that would have led one of ordinary skill in the art to arrive at the claimed invention. In the obviousness rejections, the Examiner's rationale consists entirely of the conclusory statement that "[i]t would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the front and rear panels of Lingenfelter with the areas of structural weakness of Plourde '611, in order to provide a wider access opening to the interior of the bag." April 22, 2005, Office Action, Section 5, lines 7-10. Since the

areas of structural weakness are taken from an element of Plourde '611 that does not exist in Lingenfelter, this represents nothing more than using Appellants' claims as a shopping list for elements which are found in unrelated references. Further, the reason used to justify making the combination, namely to provide a wider access opening to the interior of the bag, is not fulfilled by the combination since the opening is no wider (or narrower) than it would be without adding the lines of weakness from Plourde '611 to Lingenfelter. Appellants submit that the Examiner has relied entirely upon Appellants' disclosure and teachings to supply that which is lacking in the applied prior art references. Accordingly, the rejections fail to present a prima facie case of obviousness and cannot be sustained.

2. The 35 U.S.C. § 103 Rejections Fail to Teach the Inventions As Claimed. Each of independent Claims 75, 96, 116, and 138 includes multiple limitations which are not taught or suggested by any of the cited prior art references, either individually or in combination. Since Claims 75, 96, 116, and 138 each include multiple limitations which are not taught or suggested in the art, the rejection is deficient and cannot be sustained for this reason as well.

B. Brief Discussion of the References Cited. A brief review of the cited references is illustrative of the fact that they have been cited merely because they each contain elements which are contained in Appellants' claims without regard for what the reference teaches, or, even more importantly, what the reference fails to teach. As such, the cited references depict designs and are concerned with issues which are unrelated to

each other. The only reason for combining them is that Appellants' claims teach a combination of elements each of which elements is used (for an unrelated purpose) in one of the cited references. This use of the claimed invention as a blueprint to reconstruct the claimed invention from the isolated teachings of the prior art is an impermissible use of hindsight.

1. **The Lingenfelter Patent (U.S. Patent No. 3,181,583)**. Lingenfelter discloses a reclosable plastic bag which has a tongue and groove closure member which is mounted onto the upper end of the bag. The upper end of the bag may be torn open, but does not have a segment having two areas of structural weakness as does the present invention as claimed. The obvious disadvantage of the Lingenfelter bag is that it is not easy to see if the bag has been opened, unless the closure member is opened. Opening the closure member to determine whether the bag has been opened will result in the bag being torn open due to the construction of the Lingenfelter bag. The Lingenfelter bag is best shown in Figs. 1 through 4, annotated versions of which figures are included in the Evidence Appendix.

2. **The Plourde '611 (U.S. Patent No. 5,875,611)**. Plourde '611 discloses a side-filled bag which requires detaching the bag from other bags on the production line in order to fill it -- an approach which will necessarily greatly decrease the speed of the production line and hence the overall efficiency of the operation. The Plourde bag is manufactured with an opening on a side thereof which is not opposite a

fold as required by the claims of the present invention. In addition, the seals 46 and 48 between the flange areas 32 of the zipper tape 20 and the tube sheet material 10 in the Plourde bag are not on opposed locations which are respectively located on opposite sides of the tubular sheet of material, but are specifically stated to be required to be offset from each other. This is apparently required by the manufacturing process used by Plourde, and results in a bag which clearly has offset seals. In addition, Plourde does not produce an area between the perforations 40 on the tube sheet material 10 which is truly on opposite sides of a fold -- rather, the perforations 40 are on an arc forming one of the shorter sides of the Plourde bag, making it extremely difficult to remove the area between the perforations. The Plourde bag is best shown in Figs. 4 and 5, annotated versions of which figures are included in the Evidence Appendix.

C. The Rejection of Claims 75-77, 81-85, 89, 90, 96, 97, 101-105, 109, 110, 116, 138-141, 143, 145, 147, and 152 (including independent Claims 75, 96, 116, and 138) under 35 U.S.C. Section 103(a) as being unpatentable over Lingenfelter (U.S. Patent No. 3,181,583) in combination with Plourde (U.S. Patent No. 5,875,611) Fails to Present a Prima Facie Case of Obviousness. In rejecting claims under 35 U.S.C. § 103, the Examiner bears the initial burden of presenting a prima facie case of obviousness. See In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that would have led one of ordinary skill in the art to combine the relevant teachings of the

references to arrive at the claimed invention. See In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988) and In re Lintner, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972). In so doing, the Examiner is expected to make the factual determinations set forth in Graham v. John Deere Co., 383 U.S. 1, 17, 148 USPQ 459, 467 (1966), and to provide a reason why one having ordinary skill in the pertinent art would have been led to modify the prior art or to combine prior art references to arrive at the claimed invention. See also In re Rouffet, 149 F.3d 1350, 1355, 47 USPQ2d 1453, 1456 (Fed. Cir. 1998). Such reason must stem from some teaching, suggestion, or implication in the prior art as a whole or knowledge generally available to one having ordinary skill in the art. Uniroyal Inc. v. Rudkin-Wiley Corp., 837 F.2d 1044, 1051, 5 USPQ2d 1434, 1438 (Fed. Cir.), cert. denied, 488 U.S. 825 (1988); Ashland Oil, Inc. v. Delta Resins & Refractories, Inc., 776 F.2d 281, 293, 22y USPQ 657, 664, (Fed. Cir. 1985), cert. denied, 475 U.S. 1017 (1986); ACS Hospital Systems, Inc. v. Montefiore Hospital, 732 F.2d 1572, 1577, 221 USPQ 929, 933 (Fed. Cir. 1984). These showings by the Examiner are an essential part of complying with the burden of presenting a prima facie case of obviousness. Note In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992).

The April 22, 2005, Office Action did not present any finding regarding the knowledge one skilled in the art would have had, or any reason, either in the references themselves or in the possession of one skilled in the art, as to why one skilled in the art

would have made the combination cited in the obviousness rejection. Instead, with regard to independent Claims 75, 96, 116, and 138, the sole rationale for the combination was stated to be that "[i]t would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the front and rear panels of Lingenfelter with the areas of structural weakness of Plourde '611, in order to provide wider access opening to the interior of the bag." This rationale is believed to be incorrect, inasmuch as there is no difference in the width of the opening to the bag achieved by the combination, since that width is instead dependent on the size and geometry of the bag. Modifying the bag taught in the Lingenfelter reference to add the perforations of the Plourde '611 reference would thus not make any significant difference in the width of the opening.

In asserting that combining the Plourde '611 reference with the Lingenfelter reference would provide wider access opening to the interior of the bag, the Examiner stated that "[t]he difference in the width of the opening would be measured by the amount of bag material removed between the two lines perforations, taught by Plourde, as compared to no bag material removed by the single line of perforations of Lingenfelter." Appellants disagree inasmuch as the width of the opening (as distinguished from the length of the opening, which runs from one side of the bag to the other) would not necessarily be any larger. In fact, when the bag taught by the Lingenfelter reference is opened by tearing along the tearline 32, the resulting opening will likely be as wide as the widths between the panels 19 and 21, since there is relatively little material in the fold

itself. In contrast, in the bag taught by the Plourde '611 reference after the material between the perforations 40 is removed (as best shown in Fig. 4), the remaining portions of the sheet material 10 will likely flop toward each other, thereby actually narrowing the width of the opening. Accordingly, the Examiner's reason justifying the combination is believed to be clearly incorrect.

In actuality, what the April 22, 2005, Office Action did was to use the elements of Appellants' claims as a recipe list to facilitate a hindsight-based reconstruction of Appellants' invention. With respect to an obviousness rejection based upon a combination of references, the Court of Appeals for the Federal Circuit has stated that "virtually all [inventions] are combinations of old elements." Environmental Designs, Ltd. v. Union Oil Co., 713 F.2d 693, 698, 218 USPQ 865, 870 (Fed. Cir. 2003); see also Richdel, Inc. v. Sunspool Corp., 714 F.2d 1573, 1579-80, 219 USPQ 8, 12 (Fed. Cir. 1983) ("Most, if not all, inventions are combinations and mostly of old elements.") Since examiners will often find every element of a claimed invention in the prior art, if identification of each claimed element in the prior art were sufficient to negate patentability, very few patents would issue. However, the Court of Appeals for the Federal Circuit has stated that "the best defense against hindsight-based obviousness analysis is the rigorous application of the requirement for a showing of a teaching or motivation to combine the prior art references." Ecolochem, Inc. v. Southern California Edison Co., 227 F.3d 1361, 1371, 56 USPQ2d 1065, 1073 (Fed. Cir. 2000).

The recitation of references in the April 22, 2005, Office Action which disclose the elements of the claims without any reason that one skilled in the art would make the combination constitutes the use of hindsight and is per se improper. As stated by the Court of Appeals for the Federal Circuit, "Combining prior art references without evidence of such a suggestion, teaching, or motivation simply takes the inventor's disclosure as a blueprint for piecing together the prior art to defeat patentability -- the essence of hindsight." In re Dembiczak, 175 F.3d 994, 999, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999). This clear and inappropriate use of hindsight knowledge to establish obviousness is impermissible.

The Examiner's in response to Appellants' arguments on this point is found in a single paragraph on page 9 of the Examiner's Answer under the heading "Response to Argument." The first two sentences of this paragraph read as follows:

"In response to applicant's (sic) argument that there is no suggestion to combine the references, **the Examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art.** See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596

(Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992)." Emphasis added.

This is precisely the first point that Appellants are making in this appeal -- that the Examiner has not provided even the barest hint of a teaching, suggestion, or motivation to make either of the combination of references. Further, Appellants have maintained that there is no such teaching, suggestion, or motivation in the references, and it is clear that the Examiner did not even attempt to ascertain the knowledge generally available to one of ordinary skill in the art. It is telling that both of the cases referenced by the Examiner reversed a rejection for doing exactly what the Examiner has done in the April 22, 2005, Office Action -- failing to provide a teaching, suggestion, or motivation to combine cited references.

The only possible conclusion is that the obviousness rejection in the April 22, 2005, Office Action is an improper combination of prior art references, and is not sustainable. Accordingly, it must be withdrawn.

D. The Lingenfelter and Plourde '611 References Cited in the 35 U.S.C. § 103(a) Rejection Do Not Teach the Invention as Defined in Claims 75-77, 81-85, 89, and 90 (including independent Claim 75). The obviousness rejection is defective in that the references cited in the April 22, 2005, Office Action fail to teach all of the elements of Claims 75-77, 81-85, 89, and 90 (including independent Claim 75). In fact, independent Claim 75, which was rejected as obvious over the Lingenfelter and Plourde

'611 references, has multiple limitations which are included in the claim language thereof which limitations are neither taught nor suggested in the Lingenfelter and Plourde '611 references.

1. **The Lingenfelter and Plourde '611 References Do Not Teach the Fold Between Front and Rear Panels Forming the Bag With Areas of Structural Weakness on Opposite Sides of the Fold.** The element of a fold between front and rear panels is present in independent Claim 75:

Claim No.	Claim Element
75	at least one sheet of web material comprising at least one fold located therein, two areas of structural weakness on opposite sides of said fold

Claim 75 defines a fold between the front and rear panels forming the bag, with the areas of structural weakness being on opposite sides of the fold. If the combination of the September 10, 2004, Office Action is made, it involves replacing the bag 10 of the Lingenfelter reference with the tubular sheet material 10 of the Plourde '611 reference. The tubular sheet material 10 of the Plourde '611 reference is tubular in configuration, and has an arc at the top rather than a fold. One reviewing the specification and claims of the present patent application will conclude that the word "fold" is used in its conventional sense to mean a margin which is formed by doubling a sheet of material over itself. As such, it is clear from an examination of Fig. 4 of the Plourde '611 reference that it does not have a fold located between the perforations 40.

The Examiner has requested "evidence in applicant's (sic) specification that an 'arc', like that of Plourde, cannot be construed as a fold; especially since Plourde discloses the tubular sheet material 10 as being flattened (col. 4, lines 21-25)." Appellants' specification has both consistently referred to the segment at issue as a "fold" and has shown it in Figs. 41 and 41a as a margin which is formed by doubling the parent film 10 over itself at the location of the fold structure 11. It is a maxim of patent law that applicants can be their own lexicographer, and Appellants submit that it is clear from the specification that and drawings that the word "fold" as used therein and as used in the claims does not cover a tubular structure having an arc located between perforations as clearly depicted in the Plourde '611 reference in Fig. 4.

Appellants interpretation of the word "fold" is also consistent with dictionary meanings -- the Merriam-Webster online dictionary defines "fold" as "a margin apparently formed by the doubling upon itself of a flat anatomical structure (as a membrane)." Extrinsic sources such as dictionary definitions may be used "as long as those sources are not used to contradict claim meaning that is unambiguous in light of intrinsic evidence." Phillips v. AWH Corporation, 415 F.3d 1303, 1324, 75 USPQ2d 1321, 1335 (Fed. Cir. 2005) (*en banc*).

Additionally, the tubular sheet material 10 of the Plourde '611 reference is open on the sides rather than at the bottom end. Taking just the top portion of the bag of the Plourde '611 reference and substituting it for the top portion of the bag 10 of the

Lingenfelter device would destroy the operation of the tubular sheet material 10 of the bag of the Plourde '611 reference, since the bag of the Plourde '611 reference must necessarily be filled from the side rather than from the bottom. Since this limitation of independent Claim 75 is not taught in the cited prior art, independent Claim 75 is believed to be patentably distinguishable over the combination of Lingenfelter and Plourde '611 even if the combination was valid (which it is not).

2. **The Lingenfelter and Plourde '611 References Do Not Teach the Limitation That the Distal Margins of the Skirt Structures Are Coupled to the Web Material Forming the Bag at Corresponding Opposed Locations.** The limitation specifically requiring that the distal margins of the skirt structures be coupled to the web material forming the bag at corresponding opposed locations is present in independent Claim 75:

Claim No.	Claim Element
75	said distal margins of said skirt structures being coupled to said web material at corresponding opposed locations respectively located between said areas of structural weakness and said opening

Claim 75 thus requires that the distal margins of the skirt structures be coupled to the web material forming the bag at corresponding opposed locations. Neither the bag of the Lingenfelter reference nor the bag of the Plourde '611 reference meets this limitation, since both references quite clearly attach an intermediate portion of the skirt structure of their respective fasteners to the bag rather than the distal portions. In the Lingenfelter

reference, the intermediate portions of the closure strips 14 and 16 are attached to the panels 19 and 21, respectively, of the bag 10. The distal portions of the closure strips 14 and 16 are quite clearly adjacent but not coupled to the panels 19 and 21 of the bag 10. In the Plourde '611 reference, the offset seal 48 is quite clearly not located at the distal portion of the segment of the hood supporting the male zipper profile 24.

The Examiner has responded by stating that "the distal margins of the skirt structure in Lingenfelter and Plourde are coupled to the web material forming the bag, via intermediate portions of the structure; thus meeting applicant's (sic) claims." Appellants regard this as a clear and telling admission by the Examiner that the intermediate, and **not** the distal, portions of the skirt structure are coupled to the web material in the references. This admission clearly makes Appellants' point that the clear limitation of Claim 75 stating that "said distal margins of said skirt structures being coupled to said web material" is not met by the cited references, either individually or collectively.

Still additionally, the Plourde '611 reference is inconsistent with the Lingenfelter reference in that the Plourde '611 reference uses offset seals to attach the zipper tape 20 to the tube sheet material 10, while independent Claim 75 specifically recites that the distal margins of the skirt structures are coupled to the web material at corresponding opposed locations. The Examiner indicated that his combination does not suggest "coupling distal margins of the skirt structure of Lingenfelter to the web material in a manner shown by Plourde." Appellants note that the fold of the Lingenfelter reference is not large enough

to place the perforations of the Plourde '611 reference therein; thus, by making the combination the Examiner is clearly substituting the tubular sheet material 10 with its perforations 40 for the panels 19 and 21. Since the Plourde '611 reference specifically requires that the seals be offset, the Examiner's combination would necessarily require that the substitution of the tubular sheet material of the Plourde '611 reference for the panels of the Lingenfelter reference and the attachment of the tubular sheet material of the Plourde '611 reference to the closure strips 14 and 16.

Thus, since this limitation of independent Claim 75 is also not taught in the cited prior art, independent Claim 75 is believed to be patentably distinguishable over the combination of the Lingenfelter and '611 Plourde references even if the combination was valid (which it is not). Thus, since the cited prior art does not teach multiple limitations of independent Claim 75, Appellants believe that it is allowable, and respectfully request that the rejection of Claim 75 be reversed. Dependent Claims 76-95 depend upon independent Claim 75, which as stated above is believed to be allowable, and thus these dependent claims are also believed to be allowable, and their allowance is also respectfully requested.

E. The Lingenfelter and Plourde '611 References Cited in the 35 U.S.C. § 103(a) Rejection Do Not Teach the Invention as Defined in Claims 96, 97, 101-105, 109, and 110 (including independent Claim 96). The obviousness rejection is defective in that the references cited in the April 22, 2005, Office Action fail to teach all of the

elements of Claims 96, 97, 101-105, 109, and 110 (including independent Claim 96). In fact, independent Claim 96, which was rejected as obvious over the Lingenfelter and Plourde '611 references, has multiple limitations which are included in the claim language thereof which limitations are neither taught nor suggested in the Lingenfelter and Plourde '611 references.

1. **The Lingenfelter and Plourde '611 References Do Not Teach the Fold Between Front and Rear Panels Forming the Bag With Areas of Structural Weakness on Opposite Sides of the Fold.** The element of a fold between front and rear panels is present in independent Claim 96:

Claim No.	Claim Element
96	at least one sheet of web material comprising at least one fold located therein, two areas of structural weakness on opposite sides of said fold

Claim 96 defines a fold between the front and rear panels forming the bag, with the areas of structural weakness being on opposite sides of the fold. If the combination of the September 10, 2004, Office Action is made, it involves replacing the bag 10 of the Lingenfelter reference with the tubular sheet material 10 of the Plourde '611 reference. The tubular sheet material 10 of the Plourde '611 reference is tubular in configuration, and has an arc at the top rather than a fold. One reviewing the specification and claims of the present patent application will conclude that the word "fold" is used in its conventional sense to mean a margin which is formed by doubling a sheet of material

over itself. As such, it is clear from an examination of Fig. 4 of the Plourde '611 reference that it does not have a fold located between the perforations 40.

The Examiner has requested "evidence in applicant's (sic) specification that an 'arc', like that of Plourde, cannot be construed as a fold; especially since Plourde discloses the tubular sheet material 10 as being flattened (col. 4, lines 21-25)." Appellants' specification has both consistently referred to the segment at issue as a "fold" and has shown it in Figs. 41 and 41a as a margin which is formed by doubling the parent film 10 over itself at the location of the fold structure 11. It is a maxim of patent law that applicants can be their own lexicographer, and Appellants submit that it is clear from the specification that and drawings that the word "fold" as used therein and as used in the claims does not cover a tubular structure having an arc located between perforations as clearly depicted in the Plourde '611 reference in Fig. 4.

Appellants interpretation of the word "fold" is also consistent with dictionary meanings -- the Merriam-Webster online dictionary defines "fold" as "a margin apparently formed by the doubling upon itself of a flat anatomical structure (as a membrane)." Extrinsic sources such as dictionary definitions may be used "as long as those sources are not used to contradict claim meaning that is unambiguous in light of intrinsic evidence." Phillips v. AWH Corporation, 415 F.3d 1303, 1324, 96 USPQ2d 1321, 1335 (Fed. Cir. 2005) (*en banc*).

Additionally, the tubular sheet material 10 of the Plourde '611 reference is open on the sides rather than at the bottom end. Taking just the top portion of the bag of the Plourde '611 reference and substituting it for the top portion of the bag 10 of the Lingenfelter reference would destroy the operation of the tubular sheet material 10 of the bag of the Plourde '611 reference, since the bag of the Plourde '611 reference must necessarily be filled from the side rather than from the bottom. Since this limitation of independent Claim 96 is not taught in the cited prior art, independent Claim 96 is believed to be patentably distinguishable over the combination of the Lingenfelter and Plourde '611 references even if the combination was valid (which it is not).

2. **The Lingenfelter and Plourde '611 References Do Not Teach the Limitation That the Distal Margins of the Skirt Structures Are Coupled to the Web Material Forming the Bag at Corresponding Opposed Locations.** The limitation specifically requiring that the distal margins of the skirt structures be coupled to the web material forming the bag at corresponding opposed locations is present in independent Claim 96:

Claim No.	Claim Element
96	said distal margins being respectively coupled to said sheet of web material at corresponding opposed locations respectively located between said areas of structural weakness and said opening

Claim 96 thus requires that the distal margins of the skirt structures be coupled to the web material forming the bag at corresponding opposed locations. Neither the bag of

the Lingenfelter reference nor the bag of the Plourde '611 reference meets this limitation, since both references quite clearly attach an intermediate portion of the skirt structure of their respective fasteners to the bag rather than the distal portions. In the Lingenfelter reference, the intermediate portions of the closure strips 14 and 16 are attached to the panels 19 and 21, respectively, of the bag 10. The distal portions of the closure strips 14 and 16 are quite clearly adjacent but not coupled to the panels 19 and 21 of the bag 10. In the Plourde '611 reference, the offset seal 48 is quite clearly not located at the distal portion of the segment of the hood supporting the male zipper profile 24.

The Examiner has responded by stating that "the distal margins of the skirt structure in Lingenfelter and Plourde are coupled to the web material forming the bag, via intermediate portions of the structure; thus meeting applicant's (sic) claims." Appellants regard this as a clear and telling admission by the Examiner that the intermediate, and **not** the distal, portions of the skirt structure are coupled to the web material in the references. This admission clearly makes Appellants' point that the clear limitation of Claim 96 stating that "said distal margins of said skirt structures being coupled to said web material" is not met by the cited references, either individually or collectively.

Still additionally, the Plourde '611 reference is inconsistent with the Lingenfelter reference in that the Plourde '611 reference uses offset seals to attach the zipper tape 20 to the tube sheet material 10, while independent Claim 96 specifically recites that the distal margins of the skirt structures are coupled to the web material at corresponding opposed

locations. The Examiner indicated that his combination does not suggest "coupling distal margins of the skirt structure of Lingenfelter to the web material in a manner shown by Plourde." Appellants note that the fold of the Lingenfelter reference is not large enough to place the perforations of the Plourde '611 reference therein; thus, by making the combination the Examiner is clearly substituting the tubular sheet material 10 with its perforations 40 for the panels 19 and 21. Since the Plourde '611 reference specifically requires that the seals be offset, the Examiner's combination would necessarily require that the substitution of the tubular sheet material of the Plourde '611 reference for the panels of the Lingenfelter reference and the attachment of the tubular sheet material of the Plourde '611 reference to the closure strips 14 and 16.

Thus, since this limitation of independent Claim 96 is also not taught in the cited prior art, independent Claim 96 is believed to be patentably distinguishable over the combination of the Lingenfelter and Plourde '611 references even if the combination was valid (which it is not). Thus, since the cited prior art does not teach multiple limitations of independent Claim 96, Appellants believe that it is allowable, and respectfully request that the rejection of Claim 96 be reversed. Dependent Claims 97, 101-105, 109, and 110 depend upon independent Claim 96, which as stated above is believed to be allowable, and thus these dependent claims are also believed to be allowable, and their allowance is also respectfully requested.

F. The Lingenfelter and Plourde '611 References Cited in the 35 U.S.C. § 103(a) Rejection Do Not Teach the Invention as Defined in Claim 116. The obviousness rejection is defective in that the references cited in the April 22, 2005, Office Action fail to teach all of the elements of Claim 116. In fact, independent Claim 116, which was rejected as obvious over the Lingenfelter and Plourde '611 references, has multiple limitations which are included in the claim language thereof which limitations are neither taught nor suggested in the Lingenfelter and Plourde '611 references.

1. The Lingenfelter and Plourde '611 References Do Not Teach the Fold Between Front and Rear Panels Forming the Bag With Areas of Structural Weakness on Opposite Sides of the Fold. The element of a fold between front and rear panels is present in independent Claim 116:

Claim No.	Claim Element
116	at least one sheet of web material including first and second sides thereof, said at least one sheet of web material having a fold structure located therein a tear tape structure located in said web material on each side of said fold in said at least one sheet of web material

Claim 116 defines a fold between the front and rear panels forming the bag, with the areas of structural weakness being on opposite sides of the fold. If the combination of the September 10, 2004, Office Action is made, it involves replacing the bag 10 of the Lingenfelter reference with the tubular sheet material 10 of the Plourde '611 reference. The tubular sheet material 10 of the Plourde '611 reference is tubular in configuration,

and has an arc at the top rather than a fold. One reviewing the specification and claims of the present patent application will conclude that the word "fold" is used in its conventional sense to mean a margin which is formed by doubling a sheet of material over itself. As such, it is clear from an examination of Fig. 4 of the Plourde '611 reference that it does not have a fold located between the perforations 40.

The Examiner has requested "evidence in applicant's (sic) specification that an 'arc', like that of the Plourde '611 reference, cannot be construed as a fold; especially since the Plourde '611 reference discloses the tubular sheet material 10 as being flattened (col. 4, lines 21-25)." Appellants' specification has both consistently referred to the segment at issue as a "fold" and has shown it in Figs. 41 and 41a as a margin which is formed by doubling the parent film 10 over itself at the location of the fold structure 11. It is a maxim of patent law that applicants can be their own lexicographer, and Appellants submit that it is clear from the specification and drawings that the word "fold" as used therein and as used in the claims does not cover a tubular structure having an arc located between perforations as clearly depicted in the Plourde '611 reference in Fig. 4.

Appellants interpretation of the word "fold" is also consistent with dictionary meanings -- the Merriam-Webster online dictionary defines "fold" as "a margin apparently formed by the doubling upon itself of a flat anatomical structure (as a membrane)." Extrinsic sources such as dictionary definitions may be used "as long as those sources are not used to contradict claim meaning that is unambiguous in light of

intrinsic evidence." Phillips v. AWH Corporation, 415 F.3d 1303, 1324, 116 USPQ2d 1321, 1335 (Fed. Cir. 2005) (*en banc*).

Additionally, the tubular sheet material 10 of the Plourde '611 reference is open on the sides rather than at the bottom end. Taking just the top portion of the bag of the Plourde '611 reference and substituting it for the top portion of the bag 10 of the Lingenfelter reference would destroy the operation of the tubular sheet material 10 of the bag of the Plourde '611 reference, since the bag of the Plourde '611 reference must necessarily be filled from the side rather than from the bottom. Since this limitation of independent Claim 116 is not taught in the cited prior art, independent Claim 116 is believed to be patentably distinguishable over the combination of the Lingenfelter and Plourde '611 references even if the combination was valid (which it is not).

2. **The Lingenfelter and Plourde '611 References Do Not Teach the Limitation That the Distal Margins of the Skirt Structures Are Coupled to the Web Material Forming the Bag at Corresponding Opposed Locations.** The limitation specifically requiring that the distal margins of the skirt structures be coupled to the web material forming the bag at corresponding opposed locations is present in independent Claim 116:

Claim No.	Claim Element
116	said distal margins being coupled to said sheet of web material corresponding opposed locations on said second side of said at least one sheet of web material which are each located between said tear tape structure and said opening

Claim 116 thus requires that the distal margins of the skirt structures be coupled to the web material forming the bag at corresponding opposed locations. Neither the bag of the Lingenfelter reference nor the bag of the Plourde '611 reference meets this limitation, since both references quite clearly attach an intermediate portion of the skirt structure of their respective fasteners to the bag rather than the distal portions. In the Lingenfelter reference, the intermediate portions of the closure strips 14 and 16 are attached to the panels 19 and 21, respectively, of the bag 10. The distal portions of the closure strips 14 and 16 are quite clearly adjacent but not coupled to the panels 19 and 21 of the bag 10. In the Plourde '611 reference, the offset seal 48 is quite clearly not located at the distal portion of the segment of the hood supporting the male zipper profile 24.

The Examiner has responded by stating that "the distal margins of the skirt structure in Lingenfelter and Plourde are coupled to the web material forming the bag, via intermediate portions of the structure; thus meeting applicant's (sic) claims." Appellants regard this as a clear and telling admission by the Examiner that the intermediate, and **not** the distal, portions of the skirt structure are coupled to the web material in the references. This admission clearly makes Appellants' point that the clear limitation of Claim 116 stating that "said distal margins of said skirt structures being coupled to said web material" is not met by the cited references, either individually or collectively.

Still additionally, the Plourde '611 reference is inconsistent with the Lingenfelter reference in that the Plourde '611 reference uses offset seals to attach the zipper tape 20 to

the tube sheet material 10, while independent Claim 116 specifically recites that the distal margins of the skirt structures are coupled to the web material at corresponding opposed locations. The Examiner indicated that his combination does not suggest "coupling distal margins of the skirt structure of Lingenfelter to the web material in a manner shown by Plourde." Appellants note that the fold of the Lingenfelter reference is not large enough to place the perforations of the Plourde '611 reference therein; thus, by making the combination the Examiner is clearly substituting the tubular sheet material 10 with its perforations 40 for the panels 19 and 21. Since the Plourde '611 reference specifically requires that the seals be offset, the Examiner's combination would necessarily require that the substitution of the tubular sheet material of the Plourde '611 reference for the panels of the Lingenfelter reference and the attachment of the tubular sheet material of the Plourde '611 reference to the closure strips 14 and 16.

Thus, since this limitation of independent Claim 116 is also not taught in the cited prior art, independent Claim 116 is believed to be patentably distinguishable over the combination of the Lingenfelter and Plourde '611 references even if the combination was valid (which it is not). Thus, since the cited prior art does not teach multiple limitations of independent Claim 116, Appellants believe that it is allowable, and respectfully request that the rejection of Claim 116 be reversed.

G. The Lingenfelter and Plourde '611 References Cited in the 35 U.S.C. § 103(a) Rejection Do Not Teach the Invention as Defined in Claims 138-141, 143, 145,

147, and 152 (including independent Claim 138). The obviousness rejection is defective in that the references cited in the April 22, 2005, Office Action fail to teach all of the elements of Claims 138-141, 143, 145, 147, and 152 (including independent Claim 138). In fact, independent Claim 138, which was rejected as obvious over the Lingenfelter and Plourde '611 references, has multiple limitations which are included in the claim language thereof which limitations are neither taught nor suggested in the Lingenfelter and Plourde '611 references.

1. **The Lingenfelter and Plourde '611 References Do Not Teach the Tops of Front and Rear Panels Forming the Bag Coupled Together With Areas of Structural Weakness Below the Tops of Front and Rear Panels.** The element of a fold between front and rear panels is present in independent Claim 138:

Claim No.	Claim Element
138	said tops and said sides of said front and rear panels being coupled together an area of structural weakness located in each of said front and rear panels below said tops of said front and rear panels and extending between at least a substantial portion of said sides of said front and rear panels

Claim 138 requires that the front and rear panels forming the bag be coupled together at the tops thereof, with the areas of structural weakness being located below the tops of each of the front and rear panels. If the combination of the September 10, 2004, Office Action is made, it involves replacing the bag 10 of the Lingenfelter reference with the tubular sheet material 10 of the Plourde '611 reference. The tubular sheet material 10

of the Plourde '611 reference is tubular in configuration, and has an arc at the top rather than front and rear sides connected together at the tops thereof. Thus, the claims of the present patent application define limitations not present in the Plourde '611 reference that does not have front and rear panels connected together at the tops thereof with areas of structural weakness (such as perforations) being located below the tops of each of the front and rear panels.

Additionally, the tubular sheet material 10 of the Plourde '611 reference is open on the sides rather than at the bottom end. Taking just the top portion of the bag of the Plourde '611 reference and substituting it for the top portion of the bag 10 of the Lingenfelter reference would destroy the operation of the tubular sheet material 10 of the bag of the Plourde '611 reference, since the bag of the Plourde '611 reference must necessarily be filled from the side rather than from the bottom. Since this limitation of independent Claim 138 is not taught in the cited prior art, independent Claim 138 is believed to be patentably distinguishable over the combination of the Lingenfelter and Plourde '611 references even if the combination was valid (which it is not).

2. **The Lingenfelter and Plourde '611 References Do Not Teach the Limitation That the Distal Margins of the Skirt Structures Are Coupled to the Web Material Forming the Bag at Corresponding Opposed Locations.** The limitation specifically requiring that the distal margins of the skirt structures be coupled to the web

material forming the bag at corresponding opposed locations is present in independent

Claim 138:

Claim No.	Claim Element
138	said distal portion of said skirt structure of said first fastener track being coupled to said front panel below said area of structural weakness located in said front panel, said distal portion of said skirt structure of said second fastener track being coupled to said rear panel below said area of structural weakness located in said rear panel

Claim 138 thus requires that the distal margins of the skirt structures of the first and second fastener tracks be respectively coupled to the front and rear panels. Neither the bag of the Lingenfelter reference nor the bag of the Plourde '611 reference meets this limitation, since both references quite clearly attach an intermediate portion of the skirt structure of their respective fasteners to the bag rather than the distal portions. In the Lingenfelter reference, the intermediate portions of the closure strips 14 and 16 are attached to the panels 19 and 21, respectively, of the bag 10. The distal portions of the closure strips 14 and 16 are quite clearly adjacent but not coupled to the panels 19 and 21 of the bag 10. In the Plourde '611 reference, the offset seal 48 is quite clearly not located at the distal portion of the segment of the hood supporting the male zipper profile 24.

The Examiner has responded by stating that "the distal margins of the skirt structure in Lingenfelter and Plourde are coupled to the web material forming the bag, via intermediate portions of the structure; thus meeting applicant's (sic) claims." Appellants regard this as a clear and telling admission by the Examiner that the intermediate, and **not**

the distal, portions of the skirt structure are coupled to the web material in the references. This admission clearly makes Appellants' point that the clear limitation of Claim 138 stating that "said distal margins of said skirt structures being coupled to said web material" is not met by the cited references, either individually or collectively.

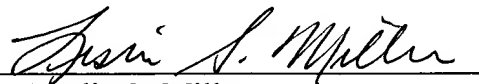
Thus, since this limitation of independent Claim 138 is also not taught in the cited prior art, independent Claim 138 is believed to be patentably distinguishable over the combination of the Lingenfelter and Plourde '611 references even if the combination was valid (which it is not). Thus, since the cited prior art does not teach multiple limitations of independent Claim 138, Appellants believe that it is allowable, and respectfully request that the rejection of Claim 138 be reversed. Dependent Claims 139-141, 143, 145, 147, and 152 depend upon independent Claim 138, which as stated above is believed to be allowable, and thus these dependent claims are also believed to be allowable, and their allowance is also respectfully requested.

Conclusions

Independent Claims 75, 96, 116, and 138 of the present application are drafted in a manner which clearly defines them over the prior art. The Examiner's combinations are each unsupportable examples of hindsight-based obviousness. In addition, even if the combinations could be made without the use of hindsight (which they cannot), they do not teach the claimed invention. Dependent Claims 76-95, 97-115 and 139-153 depend upon the aforesaid independent claims, and thus are also believed to be allowable.

Accordingly, Appellants believe the invention as presently claimed to be novel and nonobvious over the cited art and other art of which Appellants are presently aware. Appellants accordingly respectfully request the removal of all rejections of pending Claims 75-116 and 138-153, and the allowance of the present application in its entirety.

Respectfully submitted:

BY 
Leslie S. Miller
Attorney for Appellants
Registration No. 30,662

Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 2100
Milwaukee, WI 53202
(414) 298-8321

Customer No. 22922

VIII. Claims Appendix

Claims 1-74 (Cancelled).

- 1 75. (Previously Presented) A reclosable bag for filling with at least one food product,
2 said reclosable bag comprising:
3 at least one sheet of web material comprising at least one fold located therein, two
4 areas of structural weakness on opposite sides of said fold, and an opening located
5 directly opposite said fold, and
6 a reclosable fastener structure comprising two releasably engageable tracks each
7 having a skirt structure of skirt web material extending therefrom, said fold being located
8 in said reclosable fastener structure intermediate said skirt structures;
9 said skirt structures each including a distal margin;
10 said distal margins of said skirt structures being coupled to said web material at
11 corresponding opposed locations respectively located between said areas of structural
12 weakness and said opening;
13 said reclosable fastener structure extending past said fold and said areas of structural
14 weakness;
15 said reclosable bag capable of being filled with at least one food product through said
16 opening.

1 76. (Previously Presented) A reclosable bag as defined in Claim 75, wherein said
2 reclosable fastener structure extends over said fold structure to enclose said fold structure
3 therein when said reclosable fastener structure is in a closed position.

1 77. (Previously Presented) A reclosable bag as defined in Claim 75, wherein said skirt
2 web material is integral to the reclosable fastener structure.

1 78. (Previously Presented) A reclosable bag as defined in Claim 75, wherein said skirt
2 web material is coupled to said reclosable fastener structure.

1 79. (Withdrawn) The reclosable bag of claim 75 wherein the web material includes an
2 outside surface and an inside surface; the inside surface including a predetermined area
3 having a releasable adhesive material thereon; whereby a peelable seal may be formed.

1 80. (Withdrawn) The reclosable bag of claim 79 wherein the peelable seal, when
2 formed, is hermetic.

1 81. (Previously Presented) A reclosable bag as defined in Claim 75, wherein said
2 sheet of web material is substantially comprised of a sheet of a parent film material
3 having predetermined dimensions.

1 82. (Previously Presented) A reclosable bag as defined in Claim 81, wherein said
2 areas of structural weakness are integral to said parent film material.

1 83. (Previously Presented) A reclosable bag as defined in Claim 75, wherein said
2 areas of structural weakness extend linearly across a predetermined dimension of said
3 sheet of web material.

1 84. (Previously Presented) A reclosable bag as defined in Claim 83, wherein said
2 predetermined dimension is width.

1 85. (Previously Presented) A reclosable bag as defined in Claim 83, wherein said
2 predetermined dimension is length.

1 86. (Previously Presented) A reclosable bag as defined in Claim 75, wherein said
2 areas of structural weakness extend nonlinearly across a predetermined dimension of said
3 sheet of said web material.

1 87. (Previously Presented) A reclosable bag as defined in Claim 86, wherein said
2 predetermined dimension is width.

1 88. (Previously Presented) A reclosable bag as defined in Claim 86, wherein said
2 predetermined dimension is length.

1 89. (Previously Presented) A reclosable bag as defined in Claim 75, wherein said
2 areas of structural weakness extend across a predetermined dimension of said sheet of
3 web material in a predetermined pattern.

1 90. (Previously Presented) A reclosable bag as defined in Claim 75, wherein said
2 areas of structural weakness comprise perforations.

1 91. (Previously Presented) A reclosable bag as defined in Claim 75, wherein said
2 areas of structural weakness comprise scoring.

1 92. (Previously Presented) A reclosable bag as defined in Claim 75, wherein said
2 areas of structural weakness comprise microperforations.

1 93. (Previously Presented) A reclosable bag as defined in Claim 75, wherein said
2 sheet of web material comprises a multiple laminate film.

1 94. (Previously Presented) A reclosable bag as defined in Claim 93, wherein said
2 multiple laminate film includes at least one layer of material comprising a tear path.

1 95. (Previously Presented) A reclosable bag as defined in Claim 94, wherein said tear
2 path is hermetic.

1 96. (Previously Presented) A reclosable bag for filling with at least one food product,
2 said reclosable bag comprising:

3 at least one sheet of web material comprising at least one fold located therein, two
4 areas of structural weakness on opposite sides of said fold, and an opening located
5 directly opposite said fold structure;

6 a reclosable fastener structure including two releasably engageable fastener tracks
7 each having a skirt structure of skirt web material extending therefrom, said skirt
8 structures each including a distal margin, said distal margins being respectively coupled
9 to said sheet of web material at corresponding opposed locations respectively located
10 between said areas of structural weakness and said opening, wherein said reclosable
11 fastener structure extends past said areas of structural weakness and over said fold
12 structure;

13 said reclosable bag capable of being filled with at least one food product through said
14 opening.

1 97. (Previously Presented) A reclosable bag as defined in Claim 96, wherein the skirt
2 web material is integral to the reclosable fastener structure.

1 98. (Previously Presented) A reclosable bag as defined in Claim 96, wherein the skirt
2 web material is coupled to the reclosable fastener structure.

1 99. (Withdrawn) The reclosable bag of claim 96 wherein the web material includes an
2 outside surface and an inside surface; the inside surface including a predetermined area
3 having a releasable adhesive material thereon; whereby a peelable seal may be formed.

1 100. (Withdrawn) The reclosable bag of claim 99 wherein the peelable seal, when
2 formed, is hermetic.

1 101. (Previously Presented) A reclosable bag as defined in Claim 96, wherein said web
2 material of said reclosable bag is substantially comprised of a sheet of a parent film
3 material having predetermined dimensions.

1 102. (Previously Presented) A reclosable bag as defined in Claim 101, wherein the
2 areas of structural weakness are integral to said parent film.

1 103. (Previously Presented) A reclosable bag as defined in Claim 96, wherein said
2 areas of structural weakness extend linearly across a predetermined dimension of said
3 sheet of web material.

1 104. (Previously Presented) A reclosable bag as defined in Claim 103, wherein the
2 predetermined dimension is width.

1 105. (Previously Presented) A reclosable bag as defined in Claim 103, wherein the
2 predetermined dimension is length.

1 106. (Previously Presented) A reclosable bag as defined in Claim 96, wherein said
2 areas of structural weakness extend nonlinearly across a predetermined dimension of said
3 sheet of said web material.

1 107. (Previously Presented) A reclosable bag as defined in Claim 106, wherein the
2 predetermined dimension is width.

1 108. (Previously Presented) A reclosable bag as defined in Claim 106, wherein the
2 predetermined dimension is length.

1 109. (Previously Presented) A reclosable bag as defined in Claim 96, wherein said
2 areas of structural weakness extend across a predetermined dimension of said sheet of
3 web material in a predetermined pattern.

1 110. (Previously Presented) A reclosable bag as defined in Claim 96, wherein said
2 areas of structural weakness comprise perforations.

1 111. (Previously Presented) A reclosable bag as defined in Claim 96, wherein said
2 areas of structural weakness comprise scoring.

1 112. (Previously Presented) A reclosable bag as defined in Claim 96, wherein said
2 areas of structural weakness comprise microperforations.

1 113. (Previously Presented) A reclosable bag as defined in Claim 96, wherein said
2 sheet of web material is comprised of a multiple laminate film.

1 114. (Previously Presented) A reclosable bag as defined in Claim 113, wherein said
2 multiple laminate film includes at least one layer of material comprising a tear path.

1 115. (Previously Presented) A reclosable bag as defined in Claim 114, wherein said tear
2 path is hermetic.

1 116. (Previously Presented) A reclosable bag for filling with at least one food product,
2 said reclosable bag comprising:

3 at least one sheet of web material including first and second sides thereof, said at
4 least one sheet of web material having a fold structure located therein and an opening
5 located directly opposite said fold structure, said first side of said at least one sheet of
6 web material defining an interior of the reclosable bag, said second side of said at least
7 one sheet of web material defining an exterior of the reclosable bag;

8 a tear tape structure located in said web material on each side of said fold in said at
9 least one sheet of web material;

10 a reclosable fastener structure having two releasably engageable fastener halves
11 each including an integral skirt structure of skirt web material extending therefrom, said
12 integral skirt structures each including at least one distal margin, said distal margins
13 being coupled to said sheet of web material corresponding opposed locations on said
14 second side of said at least one sheet of web material which are each located between said
15 tear tape structure and said opening;
16 wherein said reclosable fastener structure extends past said tear tape structure and over
17 said fold structure;
18 said reclosable bag capable of being filled with at least one food product.

Claims 117-137 (Cancelled).

1 138. (Previously Presented) A reclosable bag for filling with at least one food product,
2 said reclosable bag comprising:
3 at least one sheet of web material defining:
4 a front panel having a top, a bottom, and sides; and
5 a rear panel having a top, a bottom, and sides, said tops and said sides of
6 said front and rear panels being coupled together, an opening being located
7 between said bottoms of said front and rear panels;

8 an area of structural weakness located in each of said front and rear panels below
9 said tops of said front and rear panels and extending between at least a substantial portion
10 of said sides of said front and rear panels; and
11 a reclosable fastener assembly comprising first and second interlockable fastener
12 tracks each having a skirt structure of skirt web material extending downwardly
13 therefrom, said skirt structures each including a distal portion, said distal portion of said
14 skirt structure of said first fastener track being coupled to said front panel below said area
15 of structural weakness located in said front panel, said distal portion of said skirt structure
16 of said second fastener track being coupled to said rear panel below said area of structural
17 weakness located in said rear panel;
18 wherein said reclosable fastener assembly extends over the portions of said front and rear
19 panels located between said areas of structural weakness and said tops of said front and
20 rear panels, and wherein said reclosable bag is capable of being filled with at least one
21 food product through said opening.

1 139. (Previously Presented) A reclosable bag as defined in Claim 138, wherein said
2 areas of structural weakness define a tear off portion located therebetween, said tear off
3 portion being capable of being removed by tearing along said areas of structural
4 weakness.

1 140. (Previously Presented) A reclosable bag as defined in Claim 138, wherein said
2 front panel and said rear panel comprise a single segment of web material, a fold being
3 located in said segment of web material intermediate said front panel and said rear panel.

1 141. (Previously Presented) A reclosable bag as defined in Claim 140, wherein said
2 fold is located intermediate said areas of structural weakness.

1 142. (Previously Presented) A reclosable bag as defined in Claim 138, wherein said
2 areas of structural weakness comprise a hermetic seal.

1 143. (Previously Presented) A reclosable bag as defined in Claim 138, wherein at least
2 a substantial portion of said areas of structural weakness extend in a direction which is
3 generally parallel to said first and second interlockable fastener tracks.

1 144. (Withdrawn) A reclosable bag as defined in Claim 138, wherein portions of said
2 front and rear panels located near said top sides thereof are releasably coupled to each,
3 thereby forming a peelable hermetic seal.

1 145. (Previously Presented) A reclosable bag as defined in Claim 138, wherein said
2 areas of structural weakness are integral to said web material.

1 146. (Previously Presented) A reclosable bag as defined in Claim 138, wherein said
2 sheet of web material comprises a multiple laminate film.

1 147. (Previously Presented) A reclosable bag as defined in Claim 138, wherein areas of
2 structural weakness comprise perforations.

1 148. (Previously Presented) A reclosable bag as defined in Claim 138, wherein areas of
2 structural weakness comprise microperforations.

1 149. (Previously Presented) A reclosable bag as defined in Claim 138, wherein areas of
2 structural weakness comprise scoring.

1 150. (Previously Presented) A reclosable bag as defined in Claim 138, additionally
2 comprising:
3 at least one tear tape structure coupled to said web material and adjacent to at least
4 one of said areas of structural weakness.

1 151. (Previously Presented) A reclosable bag as defined in Claim 138, additionally
2 comprising:
3 notches in said sides of said front and rear panels which are located adjacent
4 opposite ends of said areas of structural weakness.

1 152. (Previously Presented) A reclosable bag as defined in Claim 138, wherein opposite
2 ends of said first and second fastener tracks are sealed together.

1 153. (Previously Presented) A reclosable bag as defined in Claim 138, additionally
2 comprising:

3 a slider which is slidably mounted on said first and second fastener tracks between
4 opposite ends of said first and second fastener tracks to selectively engage said tracks
5 together and disengage said first and second fastener tracks, thereby respectively closing
6 and opening said reclosable bag.

IX. Evidence Appendix

Most Relevant Text from Application No. 09/774,275 (As Amended)

1 [0121] Referring now to FIGS. 40, 40a, 41 and 41a, an alternate embodiment of the
2 present invention may be seen. The film 10 is folded over, as shown, to form the fold
3 structure 11, and a zipper assembly 20 is positioned over the fold structure 11.
4 Weakened areas 12 are preferably positioned below the zipper structure 20a, so that when
5 the zipper structure 20a is in the open position the fold structure 11 and its weakened
6 areas 12 are exposed to allow the user access to the fold structure 11. The weakened
7 areas 12 may include structures such as perforations 12b (shown in Fig. 40b),
8 microperforations 12c (shown in Fig. 40c), scores 12d (shown in Fig. 40d), and multiple
9 laminate materials which include a layer having an area 12e of material or materials
10 which are specifically designed to be easily torn (shown in Fig. 40e). Seen particularly in
11 FIG. 41, the overlaying zipper skirt 16, of the alternate embodiment may be viewed.
12 Zipper skirt 16 is usually comprised of two strips of pieces of plastic film or a one-piece
13 unit of continuous film, and is seen to have its inside surfaces 17 sealed hermetically to
14 the outside surfaces 35b, 36b of the film 10 at respective hermetic seals 40c, 40d. The
15 fold structure 11 is preferably designed to act as an imperforate hermetic barrier to
16 protect the contents of bag 100. Tearing the fold structure 11 allows the user access to
17 the contents and also provides visual evidence that the hermetic seal is broken. Seen
18 particularly in FIGS. 40a and 41, the inside surfaces 35a, 36a of the parent film 10 may

19 also be peelably sealed to one another, using a known releasable adhesive 51, to provide
20 a releasable hermetic or gas tight seal 50 therebetween. The seal 50 is located adjacent,
21 preferably just below, the weakened areas 12.

1 [0122] As best seen in FIGS. 40 and 40a, two bags 100 are shown prior to their being
2 separated along seam 101. The alternate embodiment seen in these views is comprised of
3 parent film 10, which is used to form the bag 100 to be filled. The bag 100 further
4 includes a header 15, and a peg hole 15a, seen in this embodiment at the end opposite the
5 fold 11. It is presently believed preferable, after the folding and sealing of parent film 10
6 that the parent film 10 be punched out to form a tear area 24a. The parent film is then
7 sealed around the perimeter of the punched out tear area 24a and a tear notch 24 is added,
8 as seen in FIG. 40. These steps are preferably performed before the attachment of the
9 zipper assembly 20 and zipper skirt(s) 16. Following this, the zipper assembly 20 is
10 positioned and bonded to the outside surfaces 35b, 36b, of the parent film 10, and over
11 the fold 11. Alternately, the parent film 10 may be sealed around the perimeter to include
12 the sealed perimeter of the punched out tear area 24a so that after the punching step
13 which forms tear area 24a, the sealed perimeter remains. The tear notch 24 provides a
14 starting point for removing the fold structure 11, which is surrounded by the zipper
15 assembly 20 and attached zipper skirt 16. Further, at least one piece of tear tape 120,
16 located between the front side 35 and back side 36 of the parent film 10 on film surfaces
17 35a, 36a, of a predetermined size may be bonded or sealed to the parent film 10 at the

18 fold 11. The tear tape 120 is located adjacent, preferably just above, a tear line 132 (area
19 of structural weakness). This tear line 132 has the predetermined propensity to tear in a
20 predetermined way. The tear tape material 120 adjacent the tear line 132 facilitates
21 tearing off the fold structure 11 from the bag 100. The aforementioned tear notch 24
22 facilitated initiation of the tear.

1 [0123] Referring to FIGS. 41 and 41a, the skirt(s) 16 remain intact so that the zipper
2 assembly 20 is kept continuous for ease of handling. Once positioned over the punched
3 fold structure 11, the skirt(s) 16 of the zipper assembly 20 is bonded to the outside
4 surfaces 35b, 36b of the parent film 10 at seal location(s) 40c, 40d. Next, sides 30 and 32
5 are sealed, along margin 10c illustrated in FIG. 40, using a known mechanism such as a
6 heatsealing bar of a form fill and seal machine (as described earlier in the present
7 application) by advancing the film 10 to the heat sealing bar portion of the machine to be
8 used.

1 [0124] It will be apparent to the person of ordinary skill in the art after reading this
2 disclosure that the present alternate embodiment shown in FIGS. 40, 40a, and 41, 41a
3 may be manufactured using the methodology previously disclosed herein with the
4 necessary modifications, which this specification makes apparent to a person of skill in
5 the art.



Most Relevant Figures of Application No. 09/774,275 (As Amended) Including Annotations

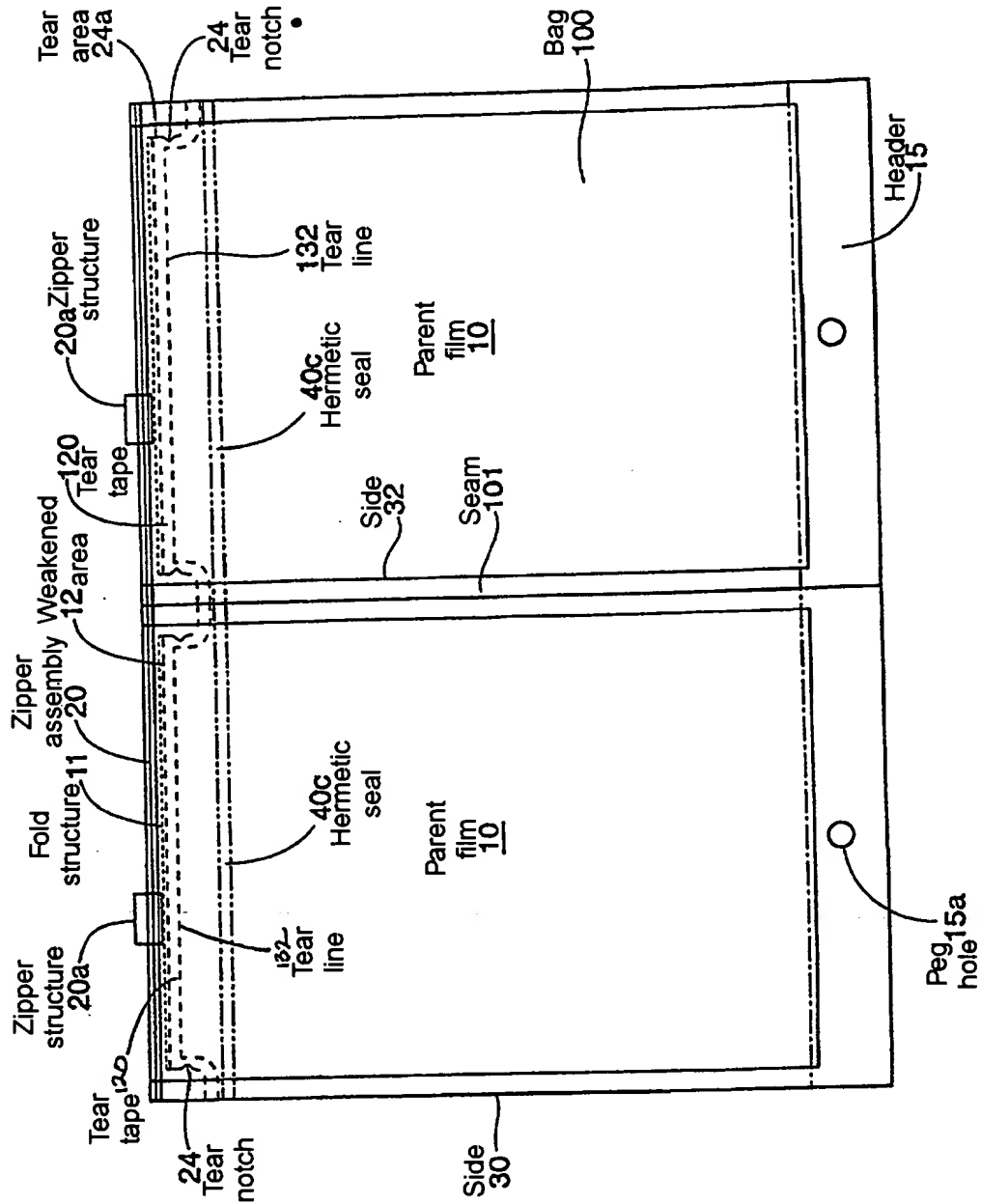


Fig. 40



Most Relevant Figures of Application No. 09/774,275 (As Amended) Including Annotations

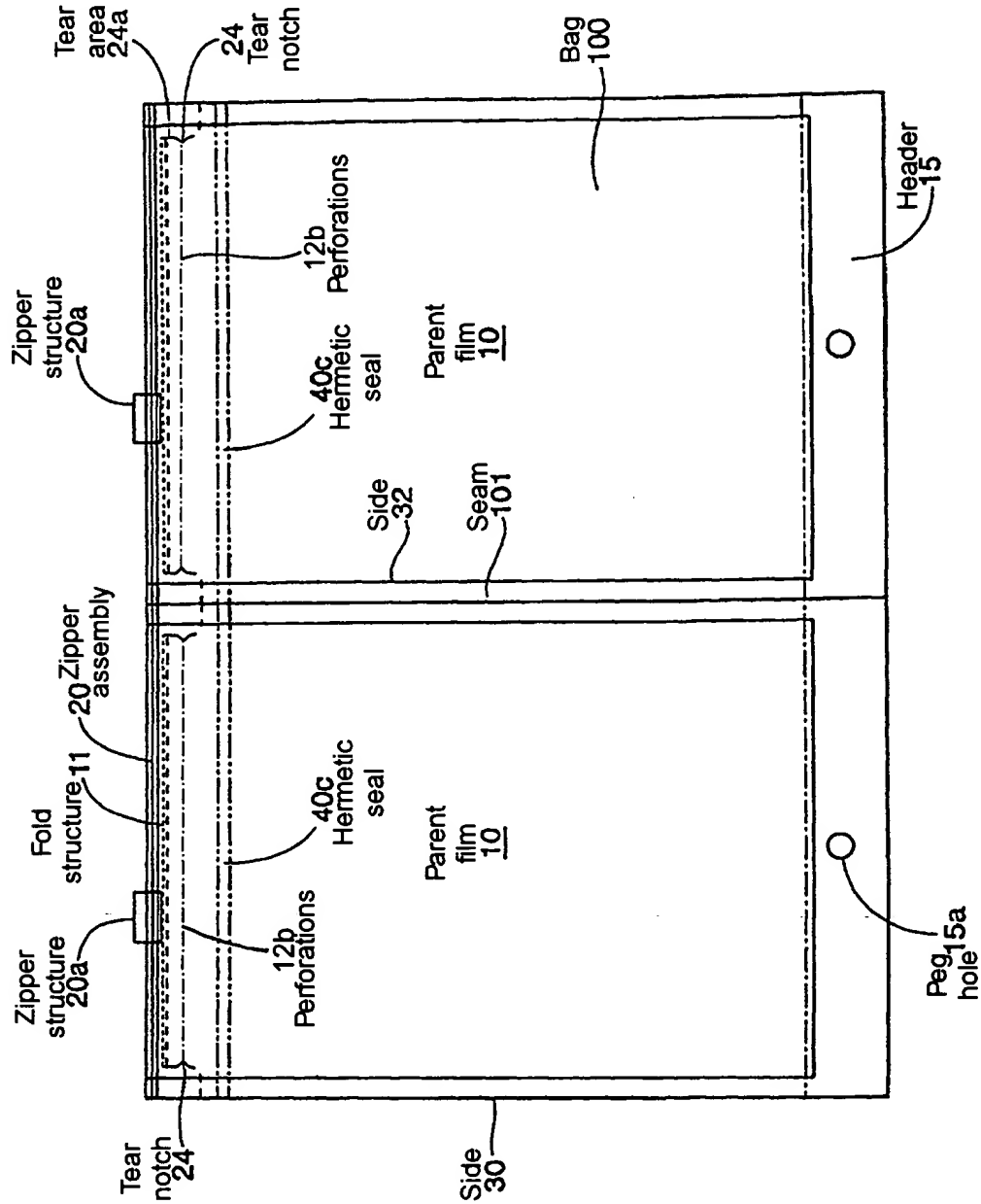
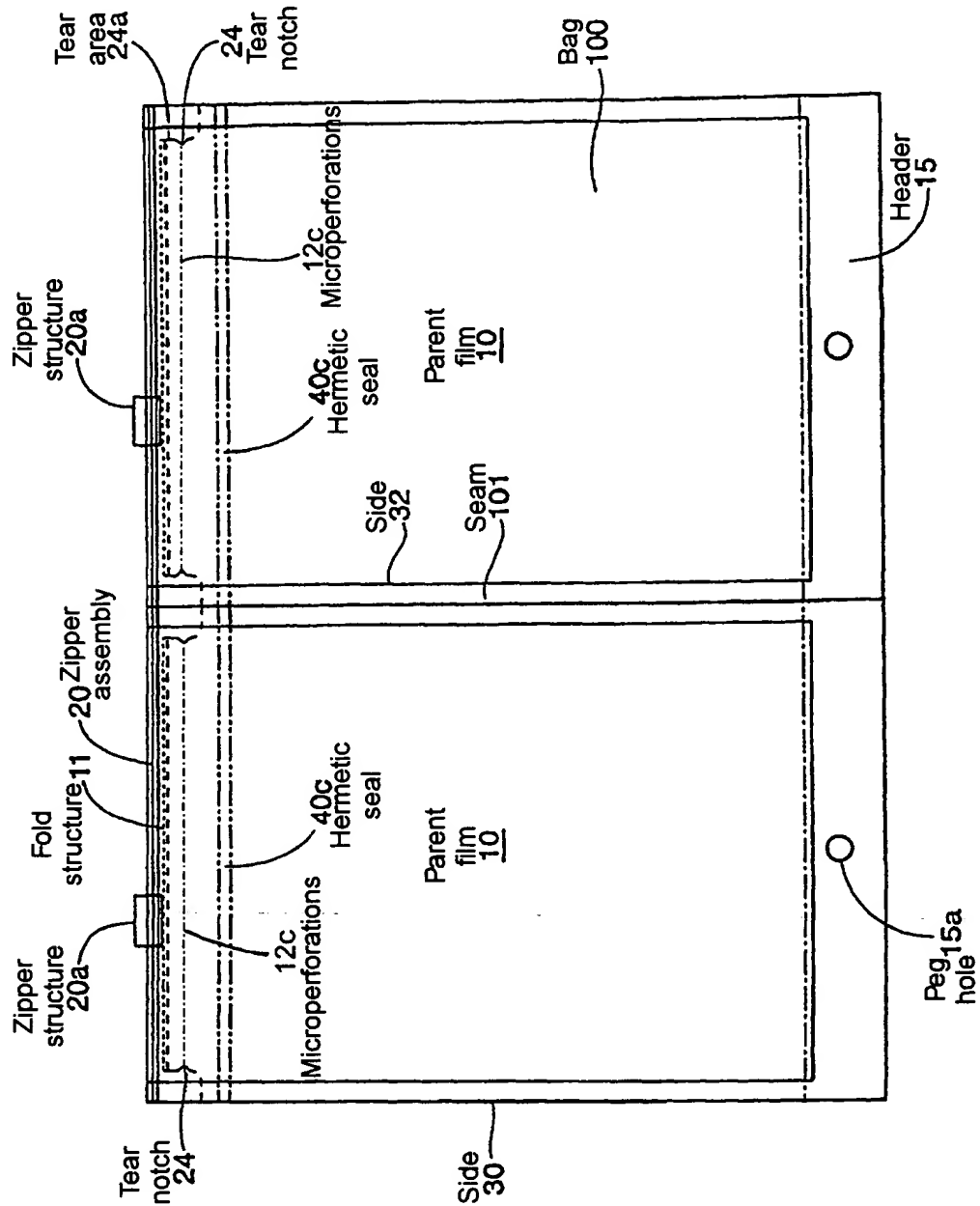


Fig. 40b



Most Relevant Figures of Application No. 09/774,275 (As Amended) Including Annotations





Most Relevant Figures of Application No. 09/774,275 (As Amended) Including Annotations

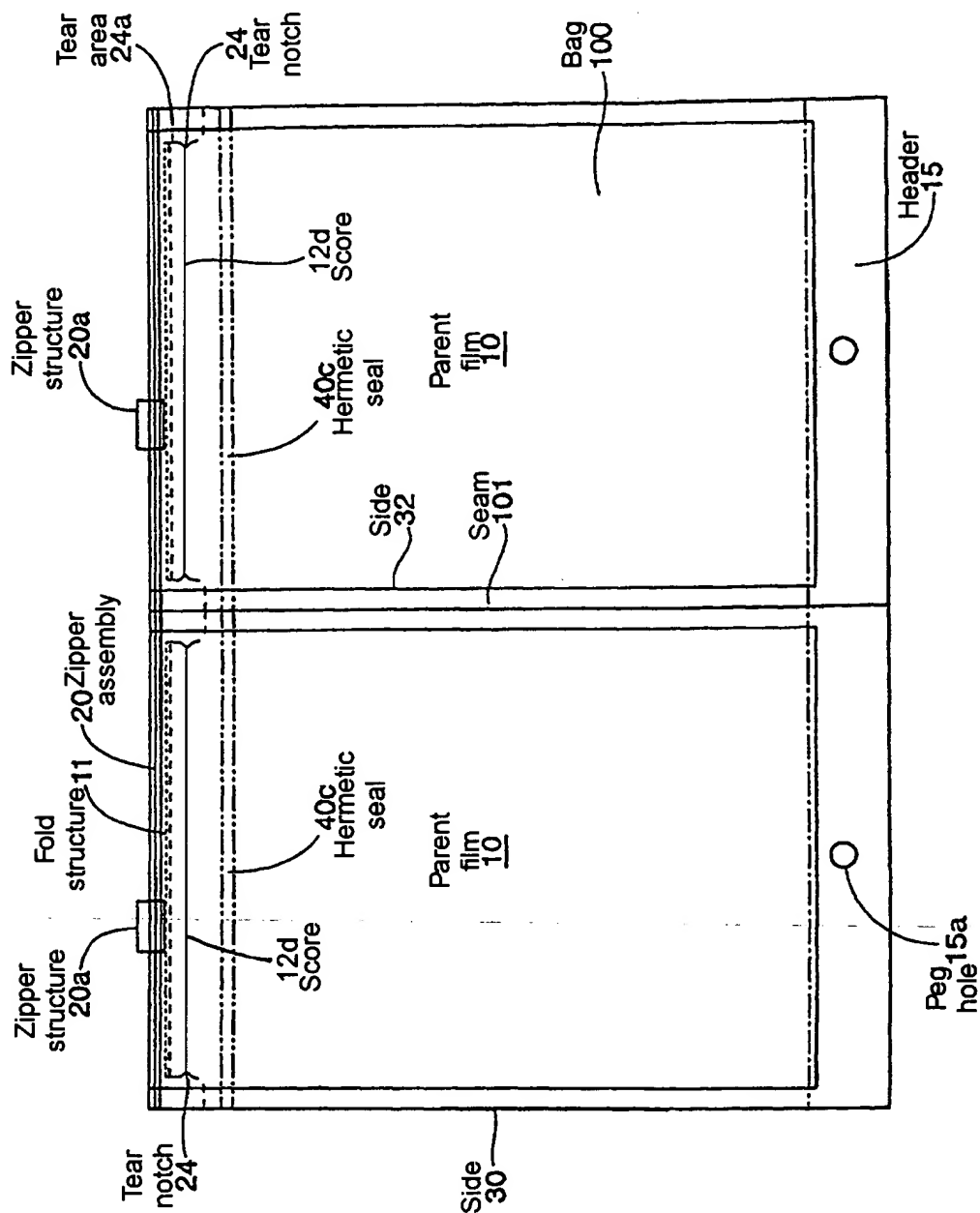


Fig. 40d



Most Relevant Figures of Application No. 09/774,275 (As Amended) Including Annotations

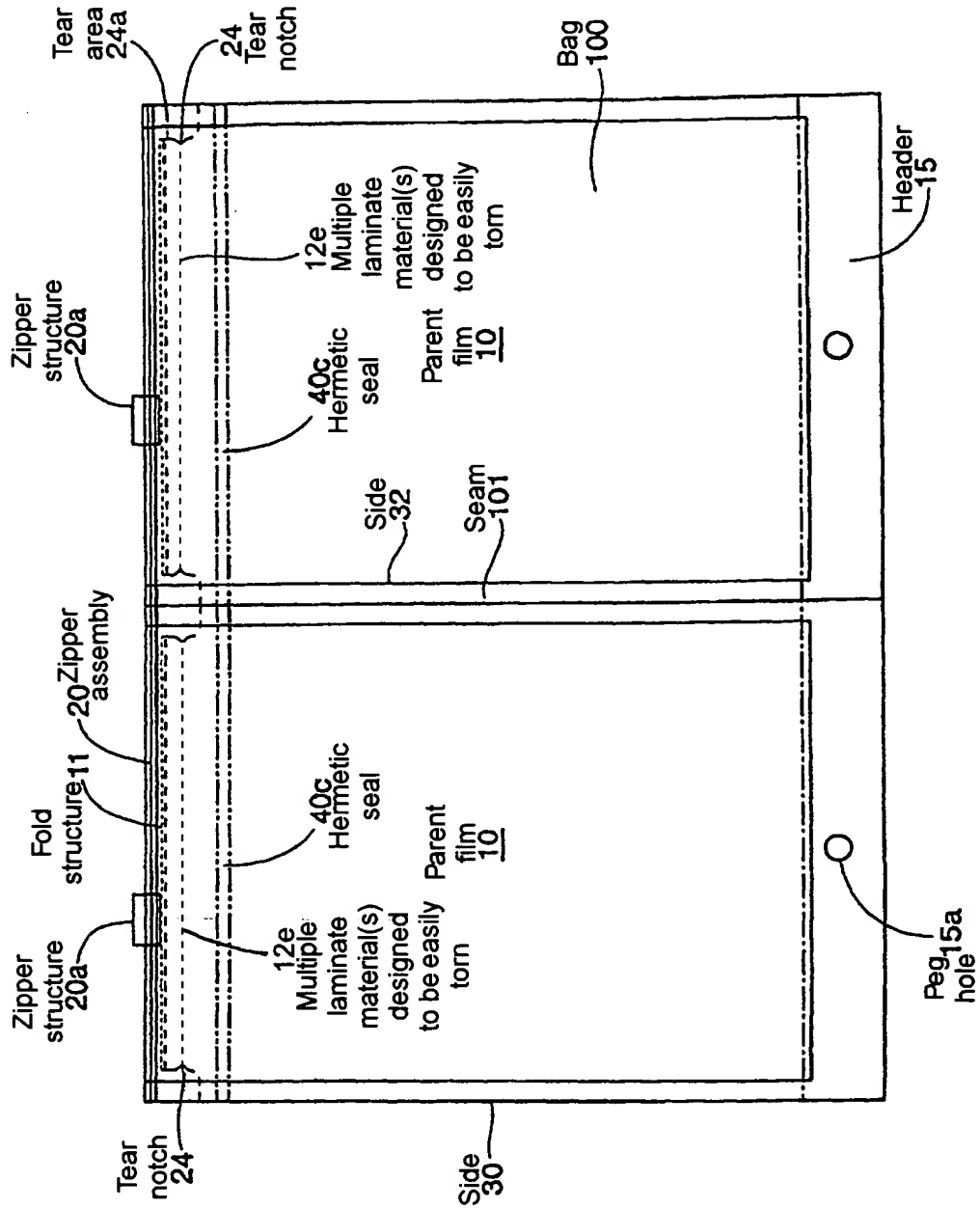


Fig. 40e

Most Relevant Figures of Application No. 09/774,275 (As Amended) Including Annotations

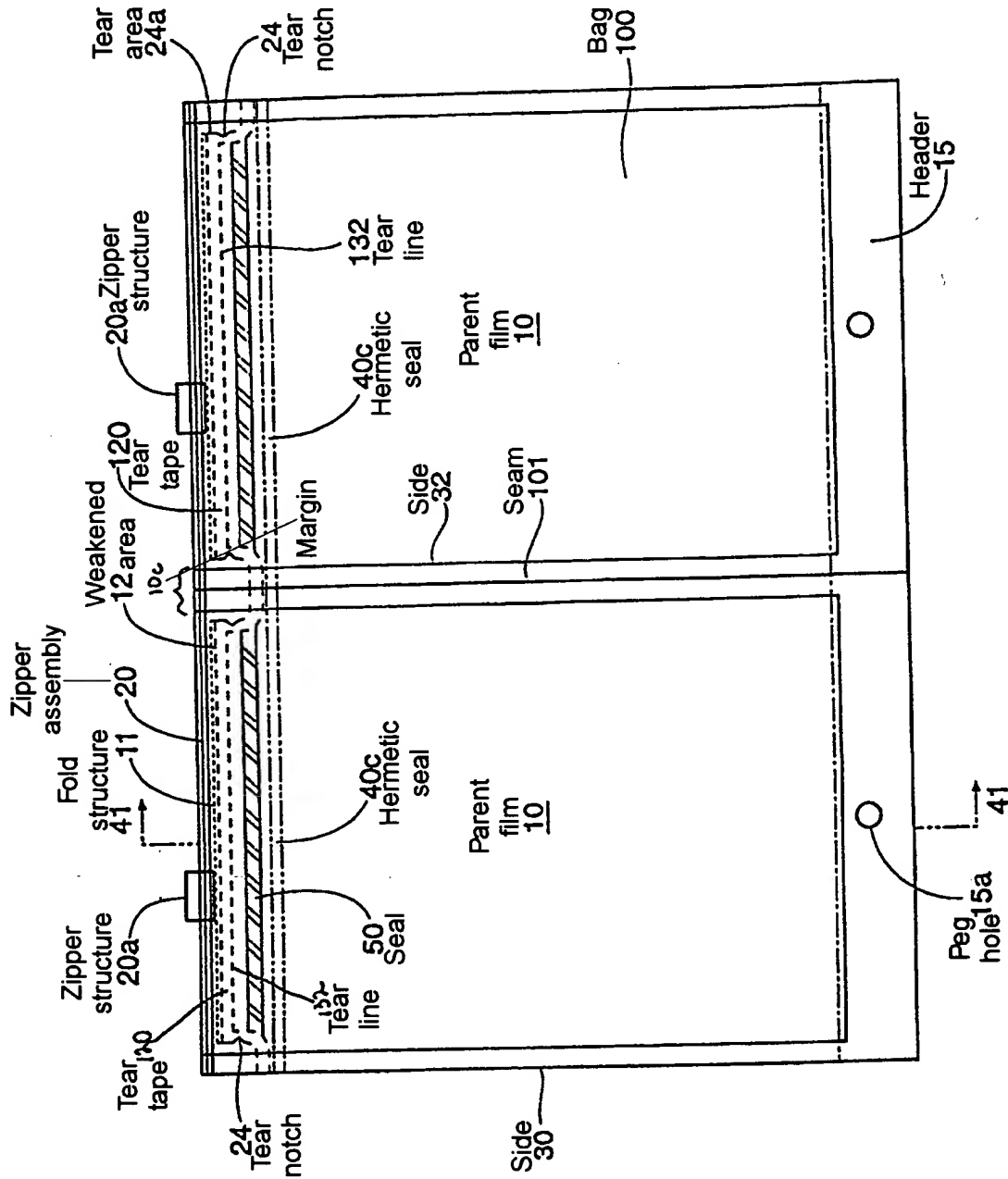
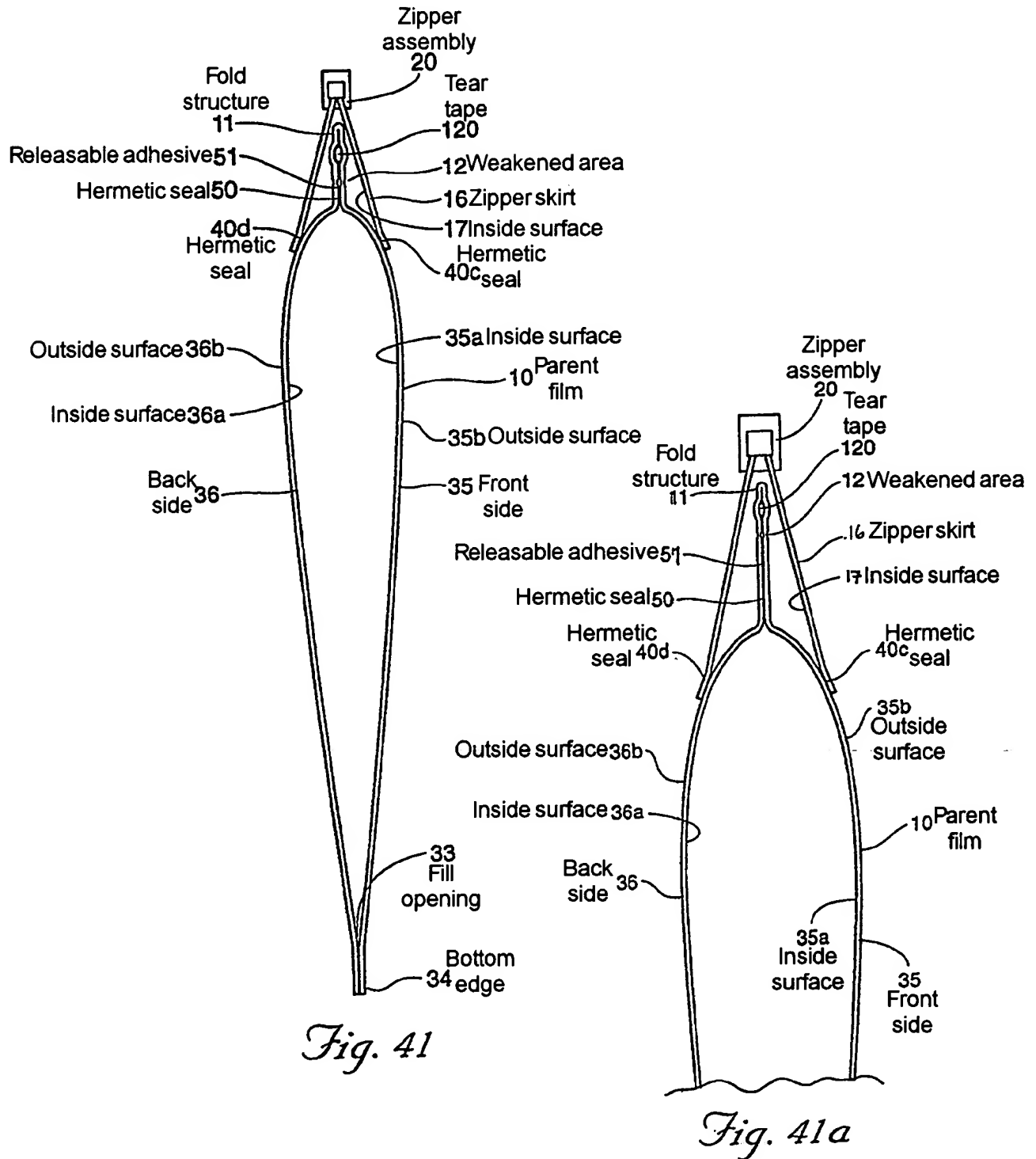


Fig. 40a



Most Relevant Figures of Application No. 09/774,275 (As Amended) Including Annotations





Most Relevant Figures of U.S. Patent No. 3,181,583 Including Annotations

May 4, 1965

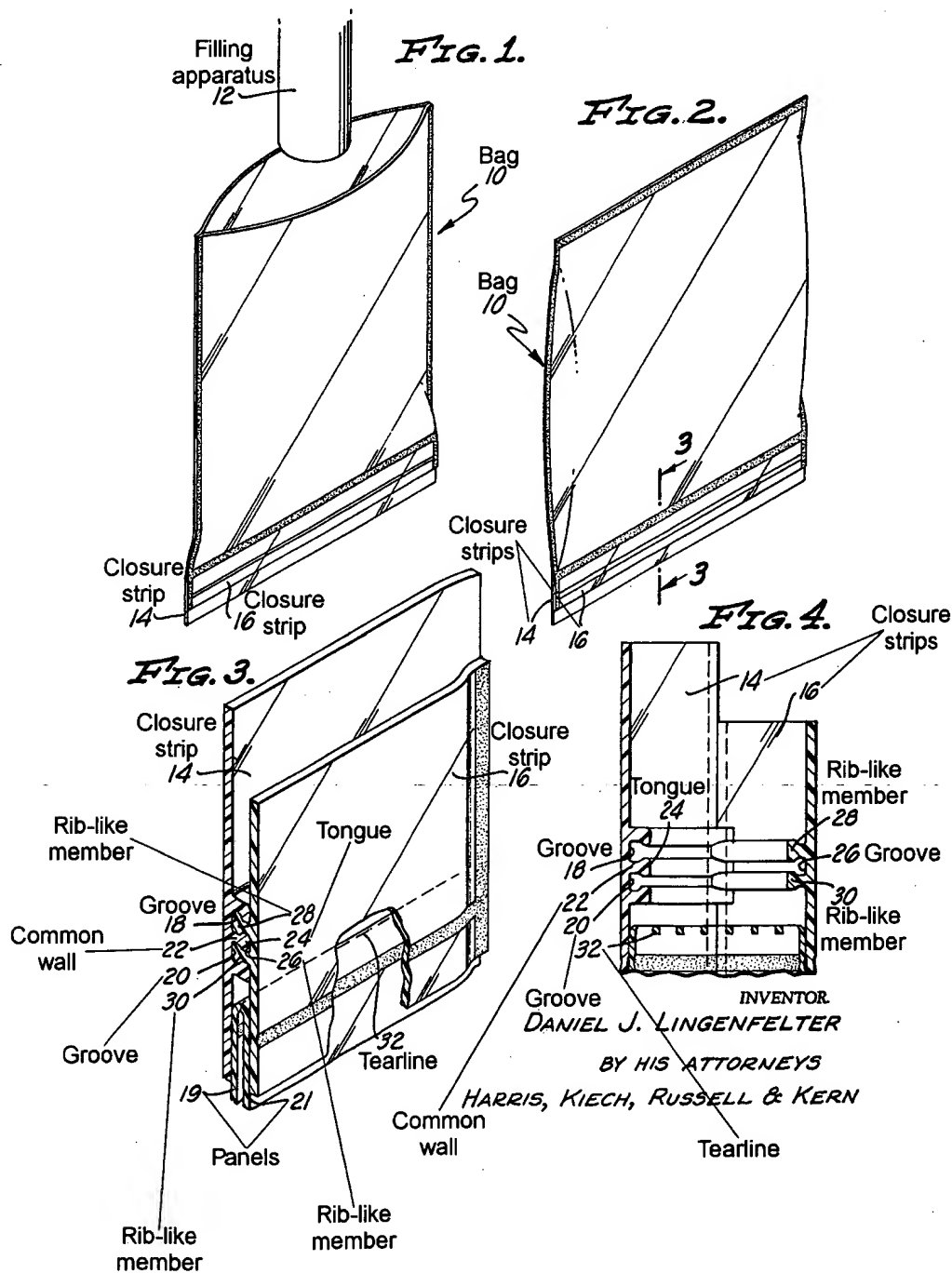
D. J. LINGENFELTER

3,181,583

RECLOSABLE PLASTIC CONTAINER

Filed Sept. 24, 1962

2 Sheets-Sheet 1





Most Relevant Figures of U.S. Patent No. 5,875,611 Including Annotations

U.S. Patent

Mar. 2, 1999
Tear
bead
28

Sheet 4 of 4

5,875,611

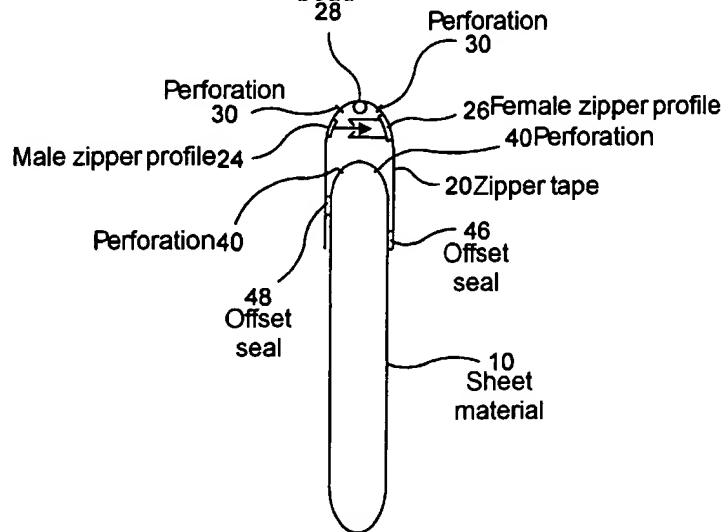


FIG. 4

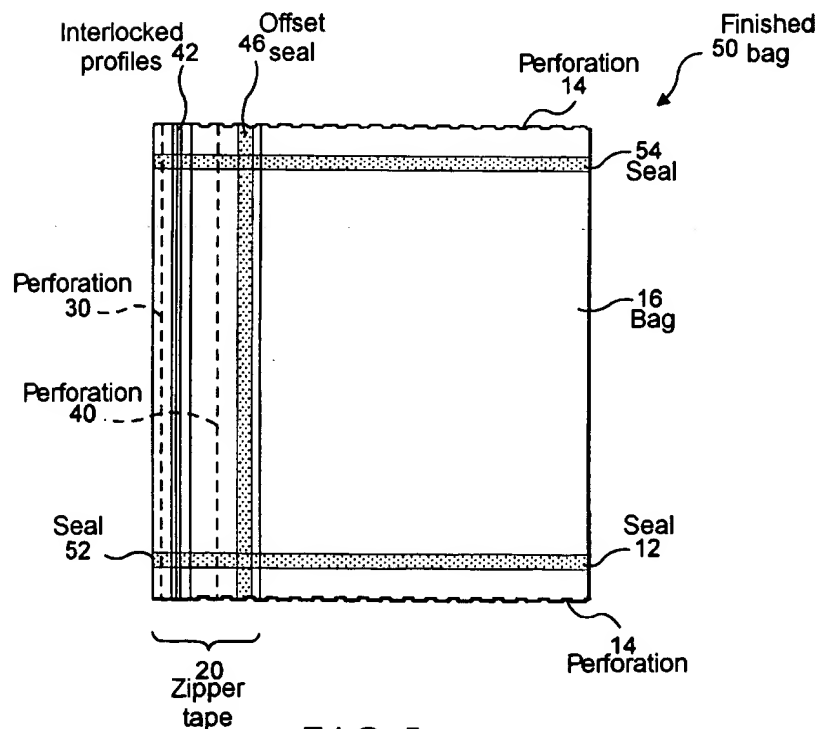


FIG. 5

Application No. 09/774,275
March 24, 2006



Page 68

X. Related Proceedings Appendix

None.